

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 306 of 2007
With
CIVIL APPLICATION No. 11271 of 2007
In
APPEAL FROM ORDER No. 306 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be
allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the
fair copy of the judgment ?

4 Whether this case involves a substantial
question of law as to the interpretation
of the constitution of India, 1950 or any
order made thereunder ?

5 Whether it is to be circulated to the
civil judge ?

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POONAM ENGINEERING WORKS
Versus
DELUX BEARING LTD.

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Appearance :

MR RR SHAH for Appellant:1

MR YJ JASANI for Respondent:1

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 30/08/2007

ORAL JUDGMENT

1. Appeal From Order is admitted. Mr.Y.J.Jasani,

learned counsel waives service of notice on behalf of respondent.

2. The present Appeal From Order has been preferred against the order dated 23rd August, 2007 passed by the learned City Civil Court at Ahmedabad in Civil Suit No.1832 of 2007 below Notice of Motion whereby ad-interim relief in terms of Para:31(a) has been granted. Ad-interim relief in terms of Para:31(a) has been granted in favour of the present respondent (original plaintiff), which reads as under. Against this order, the present appellant (original defendant) has preferred the present Appeal From Order.

“31. The plaintiff, therefore, prays:-

(a) That, defendants by themselves, their proprietors/ partners, their servants, assignees, transferees and all those connected with them may please be restrained during the pendency of the present suit by the interim injunction order of this Hon'ble Court from in any manner manufacturing, marketing, selling and/or using in relation to their “auto parts and accessories including bearings and other like goods”, the impugned mark containing and consisting of the word DELUX BEARINGS and/or SUPER DELUX BEARINGS in any manner and any

other mark which may be identical and/or deceptively similar to the plaintiff's trade mark DELUX BEARINGS so as to infringe upon the plaintiff's said trade mark registered under the provisions of the Trade Marks Act, 1999."

3. Having heard the learned counsel for both the sides and looking to the facts and circumstances of the case, I hereby quash and set aside the order passed by City Civil Court dated 23rd August, 2007 passed by the learned City Civil Court at Ahmedabad in Civil Suit No.1832 of 2007 below Notice of Motion mainly for the following facts and reasons:

3.1 It appears, prima-facie, from the facts of the case that a notice was given by the original plaintiff dated 15th December, 2005 for the infringement of registered trade mark of the original plaintiff to the defendant. As per the original plaintiff, there was no reply given by the defendant whereas before this Court in the present compilation it is averred by the present appellant (original defendant) that the reply was already given dated 19th December, 2005 by Registered Post A.D. Acknowledgment receipt is also annexed with the present compilation. This

aspect of the matter is also denied on affidavit, filed by the original plaintiff before this Court. Apart from this controversy about the reply, the fact remains that notice was give by the original plaintiff on dated 15th December, 2005 for the infringement of the registered trade mark and the suit was filed in the year 2007 especially on 23rd August, 2007. Thus, there is a considerable delay in filing the suit. Ex-parte injunction has been granted by the Trial Court. Looking to this delay, on the part of the original plaintiff, had a notice been issued the fact of the reply could have been brought on record of the Trial Court by the original defendant i.e. the present appellant.

3.2 Prima-facie, looking to the facts of the present case and the nature of the order passed by the Trial Court, no reasons have been assigned by the Trial Court. The order passed by the Trial Court reads as under:-

“Notice r/o 30.8.07 on payment of EPF. Having regard to the submissions made by the ld.advocate Mr.Jasani for the plaintiff and the documents on record it appears that the plaintiff's registered trade mark 'DELUX' is sought to be infringed by the defendant by

using the identical mark 'DELUX' for its Products-Bearings. Hence, the ad-interim relief in terms of Para:31(a) is granted till the returnable date."

3.3 Looking to the provisions of Order XXXIX Rule 3 of the Code of Civil Procedure, 1908 and the proviso thereof, reasons must have been recorded by the Trial Court for grant of ad-interim relief without issuing the notice. No such satisfaction has been arrived at by the Trial Court which is referred to in proviso to Order XXXIX Rule 3 of the Code of Civil Procedure. Therefore also, the order passed by the Trial Court deserves to be quashed and set aside.

4. Counsels for both the sides have relied upon several decisions including **1993(2) GLH 778** in the case of **Shiv Kumar Chadha Vs. Municipal Corporation of Delhi and Others**, **AIR 2002 SC 275** in the case of **Laxmikant V. Patel Vs. Chetanbhat Shah and another**, **2004(28) PTC 121** in the case of **Midas Hygiene Industries P.Ltd. & Anr. Vs. Sudhir Bhatia & Ors.**

5. Counsel appearing for the respondent (original

plaintiff) have vehemently submitted that looking to the facts of the present case, there is an infringement of the registered trade mark of the original plaintiff. Merely because the reasons have not been recorded by the Trial Court, as per proviso to Order XXXIX Rule 3 of the Code of Civil Procedure, 1908, the order may not be quashed and set aside and Ex-parte ad-interim relief as prayed in the Notice of Motion can be granted under Section 135 of the Trade Mark Act, 1999. This contention raised by the learned counsel for the respondent (original plaintiff) is not accepted by this Court mainly for the reason that notice was given by the original plaintiff much earlier in point of time i.e. on 18th December, 2005. It is stated that initially the original defendant had started manufacturing of SUPER DELUX BEARINGS. Upon issuance of this notice, this manufacturing was stopped and again it was started in the month of July, 2007, and, therefore, suit has been filed. Apart from this averment and also a fact that reply has not been received by the original plaintiff which has been given by the original defendant dated 19th December, 2005 (Annexure-A to the present compilation), the fact remains the manufacturing activity was started

earlier in point of time, comparatively, therefore if the notice would have been issued by the Trial Court, the defendant could have brought to the notice of the Trial Court the aforesaid aspect of the matter as to the reply and his defenses.

6. In view of these facts, the order passed by the Trial Court is hereby quashed and set aside. Otherwise also, the matter i.e. Notice of Motion is already fixed for hearing today before the Trial Court.

7. **Appeal is allowed.** Direct Service is permitted.

8. Civil Application also stands disposed of in view of above observations.

9. Learned counsel appearing for the original plaintiff submitted that contentions raised by the original plaintiff about Section 135 of the Trade Mark Act, 1999 about exparte relief, which can be granted, may be mentioned in this order. Looking to the facts of the case, I am not inclined to go much

in detail and in fine nicety of law and detailed interpretation of Section 135 of the Act, 1999 and also about Section 135 and the applicability of Code of Civil Procedure, 1908 especially Order 39 Rule 3, at this stage when the Notice of Motion is already fixed for further hearing today before the Trial Court.

(D.N.PATEL, J.)

Amit/-